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May 30, 1996

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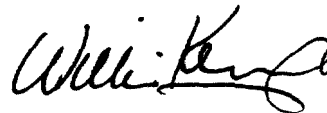
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Parties of Record
MM Docket No. 94-10

Re: In re Applications of The Lutheran Church/Missouri Synod for Renewal
of Licenses of Stations KFUE/KFUE-FM Clayton, Missouri, MM
Docket No. 94-10

For your information, enclosed is a document provided by the Commission on May 7, 1996, upon request, to the Commerce, Justice, State, and Judiciary Subcommittee of the House Appropriations Committee, in the context of its review of the FCC's Fiscal Year 1997 Budget Estimates. Also enclosed is a cover memorandum attaching the same document, which the Commission provided to the Commerce, Justice, State, Judiciary, and Related Agencies Subcommittee of the Senate Appropriations Committee on May 16, 1996.

Sincerely,



William E. Kennard
General Counsel

Enclosures

cc: Public file in MM Docket No. 94-10

PARTIES OF RECORD IN MM DOCKET NUMBER 94-10

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Office of Managing Director

Associate Managing Director for Operations

5/16/96

To: David Taylor

Remarks:

David, the House requested a status on the report on the Commission's policy regarding religious broadcasters mentioned in the Conference report to HR 2076. We provided a copy of the attached to House Subcommittee staff. I thought you might want a copy also.

Thanks

Marilyn McDermott

May 6, 1996

Employment Discrimination by Religious Broadcasters

Section 73.2080(a) of the Commission's rules provides that "[e]qual opportunity in employment shall be afforded by all [broadcast station] licenses . . . to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex." 47 C.F.R. § 73.2080(a) (emphasis added). In order to accommodate the rights of religious broadcasters, however, the Commission has exempted from its equal employment opportunity (EEO) and anti-discrimination regulations individuals hired to espouse the station's religious philosophy over the air. Complaint by Anderson, 34 F.C.C.2d 937, 938 (1972), aff'd sub nom. King's Garden, Inc., 38 F.C.C.2d 339 (1972), aff'd, King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974); see also Request of National Religious Broadcasters, Inc., 43 F.C.C.2d 451 (1973) (the exemption from the Commission's rules proscribing religious discrimination "is limited to those who, as to content or on-the-air presentation, are connected with the espousal of the licensee's religious views.").

As noted, this exemption from the Commission's general EEO and anti-discrimination rules was upheld by the United States Court of Appeals for the District of Columbia Circuit in 1974. King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974). The court rejected the argument that the Commission's limited religious discrimination exemption must be conformed to the broader statutory exemption adopted in the 1972 amendments to Title VII of the Civil Rights Act of 1964. Prior to 1972, Section 702 of Title VII exempted from the Civil Rights Act's ban on religious discrimination in employment all "religious activities" of religious organizations. The 1972 amendment expanded the exemption to include all "activities" of religious organizations. See 42 U.S.C. § 2000e-1(a). The King's Garden court found that the Commission's rules were promulgated under a separate source of authority -- the "public interest" standard of the Communications Act -- and that Congress in no way indicated an intent that the FCC carve a like exemption into its own rules. 498 F.2d at 53, 57; see also 38 F.C.C.2d at 340-41. The court concluded that the Commission's limited exemption "adequately protects a sectarian licensee's rights under the Communications Act and the First Amendment." 498 F.2d at 54. It pointed out that a religious group will only confront the Commission's rules when it seeks out the "temporary privilege of holding a broadcast license, . . . 'a limited and valuable part of the public domain.'" 498 F.2d at 60 (citation omitted). The court noted that "[a] religious sect has no constitutional right to convert a licensed communications franchise into a church. A religious group, like any other, may buy and operate a licensed radio or television station. . . . But, like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations.'" Id. (citations omitted). The court concluded: "Where a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension, enforcement of the Commission's anti-bias rules will not compromise the licensee's freedom of religious expression." Id. at 61.

The Commission's religious discrimination policy is at issue in a case pending at the Commission. In Lutheran Church/Missouri Synod, 9 FCC Rcd 914 (1994), the Commission designated for hearing the license renewal applications of two radio stations owned by the Lutheran Church/Missouri Synod (LCMS). The Commission found substantial and material questions of fact as to the licensee's compliance with the Commission's EEO rules because of, among other things, its requirement that prospective employees for many positions have "Lutheran training." Id. at 923. Following a formal hearing, the Administrative Law Judge issued an opinion concluding that the stations "violated the Commission's EEO rules and policies by improperly giving preferential hiring treatment to individuals with knowledge of LCMS or Lutheran doctrine, and to active members of Christian or LCMS congregations, for positions which were not reasonably connected with the espousal of the Church's religious views." Lutheran Church/Missouri Synod, 10 FCC Rcd 9880, 9916 (Initial Decision of ALJ, 1995). Among these positions were receptionist, secretarial, engineering, and business manager positions. Id. at 9909; see id. at 9886-87.

The ALJ rejected the licensee's argument that King's Garden has been overruled by Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987), which upheld under the First Amendment the broader statutory religious discrimination exemption in Title VII as applied to nonprofit activities of religious employers. Id. at 339. The ALJ pointed out that "the Commission and the courts have consistently distinguished the Commission's EEO requirements from those of Title VII." 10 FCC Rcd at 9909. The ALJ also rejected the licensee's contention that its judgment as to which employment positions require religious knowledge, training, or expertise may not be second-guessed by the Commission, finding that such an interpretation "'would tend to create a favored class of licensees immune from Commission scrutiny although questions justifying inquiry into other licensees existed.'" Id. (citation omitted). Although the ALJ found the licensee's deficiencies sufficiently severe to warrant the imposition of EEO reporting conditions and a forfeiture, he did not find denial of the renewal applications to be appropriate given the lack of evidence of intentional discrimination against minorities. Id. at 9916.

The ALJ's decision was appealed to the Commission's Review Board. On April 23, 1996 (just prior to its elimination), the Review Board adopted a decision affirming the ALJ's decision and ordering that the license renewal applications are granted for a short term, subject to EEO reporting conditions, and that the licensee pay a \$50,000 forfeiture. Because the matter may still come before the full Commission, the case is still a "restricted" proceeding under the Commission's ex parte rules. It therefore would be inappropriate to comment any further on the Commission's position on this case at this time.

It should also be noted that on April 30, 1996, the National Religious Broadcasters (NRB) filed comments in the Commission's pending Broadcast EEO Streamlining rulemaking proceeding (MM Docket No. 96-16), in which the NRB requests expansion of the religious broadcasting exemption to the EEO rules.